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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/939,412	08/24/2001	Jerry L. Aikins	ZIM0090	4304

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BAKER & DANIELS  
111 E. WAYNE STREET  
SUITE 800  
FORT WAYNE, IN 46802

EXAMINER

PRIDDY, MICHAEL B

ART UNIT	PAPER NUMBER
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3732

DATE MAILED: 09/10/2003

8

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/939,412

Applicant(s)

AIKINS ET AL.

Examiner

Michael B Priddy

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-7 and 13-40 is/are pending in the application.
- 4a) Of the above claim(s) 17-29 is/are withdrawn from consideration.
- 5) ☐ Claim(s) 1-5 and 13-16 is/are allowed.
- 6) ☐ Claim(s) 6,7 and 30-40 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

## **DETAILED ACTION**

### ***Claim Objections***

Claim 31 is objected to because of the following informalities: in line 2, "thought" should be --through--. Appropriate correction is required.

Claim 40 is objected to because of the following informalities: in line 3, "though" should be --through--. Appropriate correction is required.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claim 6 is rejected under 35 U.S.C. 102(b) as being anticipated by Johnston (US 3,716,050). Johnston teaches a bone plate assembly comprising a bone plate 20 having elongate plate 22 and blade 24 portions connected to one another at a bend and disposed at an angle with respect to one another, said plate portion 22 having a first hole 30 therein and a second hole 26 therein which is disposed intermediate said first hole and said bend; a strut screw 36 disposed through said first hole 30 and extending toward said blade portion; a top screw 36 disposed through said second hole 26, said

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top screw 36 extending angularly to one side of said strut screw; a third hole disposed intermediate said first and second holes; and another top screw disposed through said third hole, said another top screw extending angularly to another side of said strut screw opposite said first side.

Claims 30-40 are rejected under 35 U.S.C. 102(b) as being anticipated by Gottfried (US 5,429,641). Gottfried teaches a bone plate having elongated plate 1 and blade 2 portions disposed at an angle with respect to one another, said plate portion 1 having a plurality of holes 7 therein; an insertion guide member 47 detachably securable to said plate portion of said bone plate; and a screw guide 43 detachably securable to said insertion guide member in alignment with one of said plurality of holes in said plate portion; wherein said screw guide further includes a screw guide member III (strut screw guide member / top screw guide member) disposed at an angle with respect to each of said blade and plate portions and through which a strut screw II (top screw) may be inserted; said kit further comprising a strut screw II (top screw) insertable through said guide member and said one of said holes 7 in said plate portion 1; further including a handle member 21 engageable with said screw guide III and said insertion guide member 20 for detachably securing said screw guide III and said insertion guide member 20 to one another.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Johnston as applied to claim 6 above, and further in view of the following. Johnston discloses the claimed invention except for the radius defined intermediate said plate portion and said blade portion being .25 inches or less. It would have been an obvious matter of design choice to one skilled in the art at the time the invention was made to construct the bone plate of Johnston such that the radius defined intermediate said plate portion and said blade portion was .25 inches or less, since applicant has not disclosed that such solves any stated problem or is anything more than one of numerous shapes or configurations a person ordinary skill in the art would find obvious for the purpose of providing an angle between two portions of a bone plate. In re Dailey and Eilers, 149 USPQ 47 (1966).

#### ***Allowable Subject Matter***

Claims 1-5 and 13-16 are allowed.

#### ***Response to Arguments***

Applicant's arguments filed 07/07/2003 have been fully considered but they are not persuasive. With respect to claim 6, Applicant has argued that the claim recites a blade portion extending into the bone wherein when the blade portion is inserted into

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bone, the radius fits closely adjacent the outside surface of the bone and that Johnston discloses a bone plate in which the blade portion rests on top of the surface of the bone and is not inserted into the bone. Applicant appears to be asserting the intended use of the present invention is different from that of Johnston. While the intended use of the two inventions may indeed be different, it has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (1987).

With respect to claims 30-40 Applicant has not pointed out the alleged shortcomings of the prior art reference and refers to structural features of the reference which have not been mentioned by the Examiner. Applicant's arguments therefore amount to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references. Additionally, Applicant's arguments do not clearly point out the patentable novelty which he or she thinks the claims present in view of the state of the art disclosed by the references cited or the objections made.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael B. Priddy whose telephone number is (703) 308-8620. The examiner can normally be reached on Mon.-Fri. 8 a.m. - 5 p.m..

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kevin Shaver can be reached on (703) 308-2582. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9302 for regular communications and (703) 872-9303 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1148.

Michael Priddy

*Michael B. Priddy*  
September 9, 2003